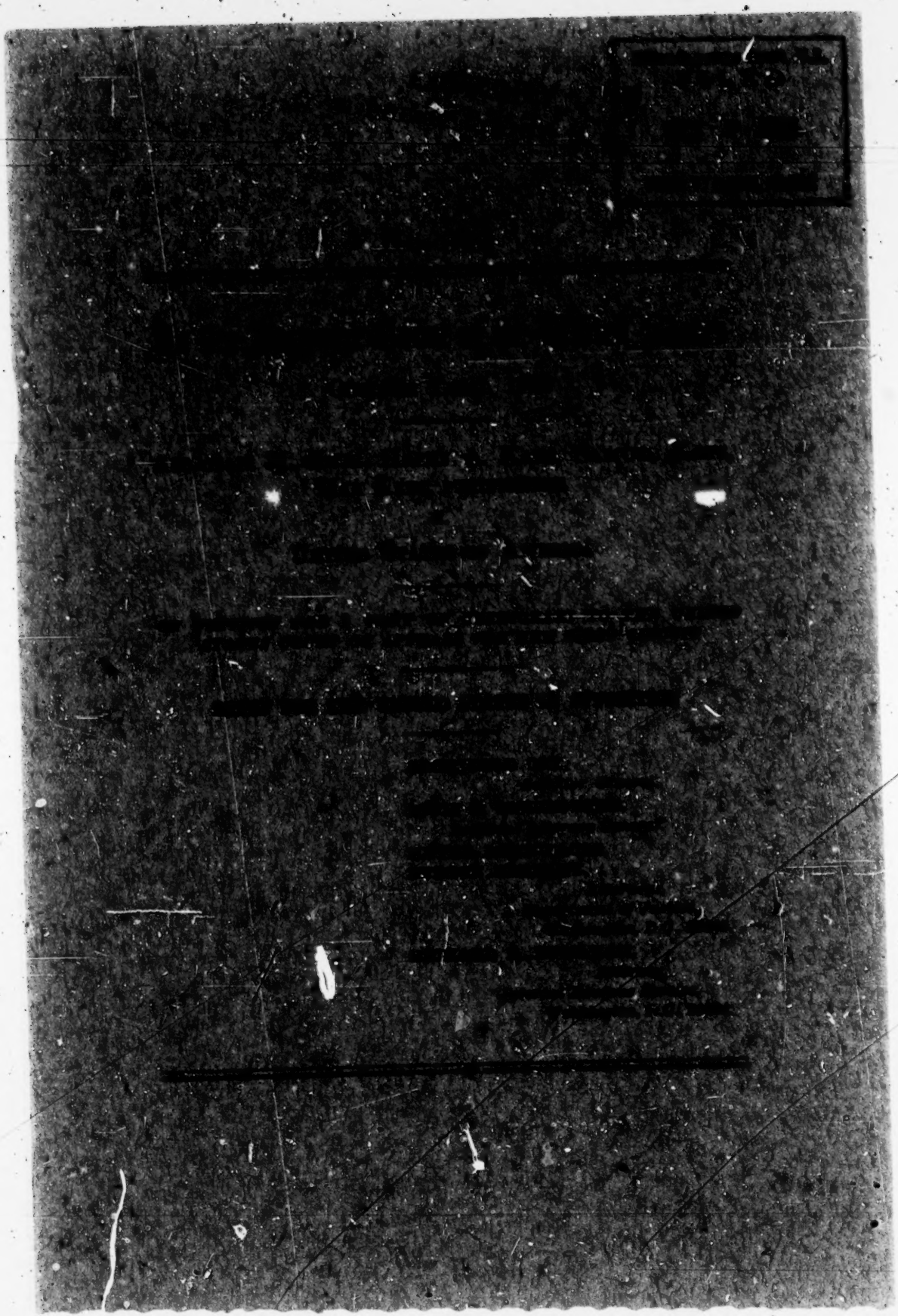

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 392

ABRAHAM M. KATZ, HARRY A. KATZ, SAMUEL KATZ, MAX KATZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 20–28) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1963. (Pet. 29.) Petition for rehearing was filed on July 24, 1963 (R. 1305–1311), and denied on July 29, 1963 (R. 1312). The petition for a writ of certiorari was filed on August 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge properly denied petitioners' motion to suppress a corporate book, the existence of which was voluntarily revealed to a revenue agent by Max Katz and which was voluntarily produced by the corporation in response to an administrative summons.

2. Whether the trial judge correctly denied petitioners' motions to strike the petit jury panel and dismiss the indictment because of alleged improprieties in selecting the petit and grant jury panels.

3. Whether the trial court erred in admitting against Abraham, Samuel and Harry Katz (for the limited purpose of corroborating the amounts of income reported on their tax returns) certain corporate books and records kept by Max Katz, and in instructing the jury that such books and records could be considered against the other three petitioners only if the jury found that petitioners had had access to them and that they were kept in the regular course of business.

STATUTES INVOLVED

Section 7201 of the Internal Revenue Code of 1954, and Sections 1732(a) and 1865(a) of 28 U.S.C., are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

On March 9, 1962, petitioners were indicted in the United States District Court for the District of Massachusetts for the wilfully attempted evasion of

their individual income taxes for the years 1955 through 1958[1] in violation of Section 7201 of the Internal Revenue Code of 1954. (R. 1, 8–18.)[2] After a jury trial lasting four weeks, Max Katz was found guilty on four counts, fined $40,000 and sentenced to four months in prison; Abraham Katz was found guilty on four counts, fined $20,000 and sentenced to two months; and Samuel and Harry Katz were each found guilty on two counts, fined $10,000 and sentenced to imprisonment for one month. (R. 94–99.)

Prior to trial, petitioners had moved to suppress a "black book" (R. 23) which they alleged had been obtained in violation of the constitutional rights of Max Katz and State Line Potato Chip Company, Inc. (referred to hereinafter as "the corporation"). After a full pre-trial hearing (R. 22–83), the district

[1] Samuel Katz was not indicted for the year 1955.

[2] The total unreported income and tax deficiencies alleged in the indictment were as follows:

Counts	Record Page	Name of Petitioner	Unreported Income	Unreported Tax
1–4	8–11	Abraham Katz	$82,022.83	$48,219.19
5–8	11–13	Harry Katz	35,312.33	16,062.07
9–12	13–16	Max Katz	247,041.39	164,397.20
13–15	16–18	Samuel Katz	21,541.43	9,012.11
Totals			$385,917.98	$237,690.57

Max Katz was also indicted for the willfully attempted evasion of corporate income taxes of State Line Potato Chip Company, Inc., for the years 1955 through 1958, totalling $292,351.49. (R. 18–21.) On the second day of the trial, however, the court severed the corporate counts and declared a mistrial as to them. (R. 4, 90.)

court (Judge Wyzanski) made findings of fact and denied the motion (R. 83–87). The motion was renewed at the trial and again denied (R. 327–329), but the "black book" was stricken on the government's motion at the close of the government's case (R. 864).

Just before the trial began petitioners moved to strike the petit jury panel and to dismiss the indictment because of alleged improper selection of both the petit and grand jury panels. These motions were denied. (R. 88–89, 107–111.)

The following evidence supports the verdicts of guilty:

Max, Abraham and Samuel Katz are brothers; Harry Katz is their brother-in-law. (R. 983.) During the pertinent years, petitioners were the sole officers, directors and stockholders of the corporation. (Pet. 4; R. 1173.) The only bank account referred to in the corporate books[3] was a checking account at a Springfield, Massachusetts, bank, out of which all of the company's expenses were paid. (R. 288–289, 1181.) However, investigation disclosed two other bank accounts into which corporate funds, unrecorded on the books and unreported on the individual income tax returns, were deposited: (1) the corporation's account in the Palmer National Bank; and (2) the so-called "War Bond" account. Sub-

[3] The corporate books and records relevant here are the cash receipts and disbursements book, the general ledger, and certain canceled checks. (R. 703–704, 871–874.) All of the tax returns were prepared by an accountant from trial balances and other information furnished him by Max Katz. (R. 158–159, 192–193.) The accountant usually did not have the corporate books when he prepared the tax returns. (R. 156.)

stantial amounts of income earned by the corporation were deposited in its account at the Palmer National Bank and then diverted to the private benefit of the petitioners and members of their families (R. 236–242, 594–607, 715–741, 1233–1243). The jury could have found that approximately $184,000 of unreported income was channelled into petitioners' hands in this manner (R. 1287–1290).

Substantial amounts earned by the corporation were also deposited in its so-called "War Bond" account and eventually passed to petitioners and their immediate families (R. 201–205, 330–331, 704–715, 1231–1232). The jury could have found that these diversions totalled about $52,000 (R. 1287–1290).*

The government's proof also showed that Max and Abraham Katz (each of whom owned 35% of the corporation's outstanding stock) had earned no less than $50,000 in unreported interest income during the pertinent years on more than 200 savings accounts opened in their own names and the names of members of their families, and that each of the petitioners had failed to report either certain dividend income or interest received on the redemption of substantial numbers of United States Government Bonds (R. 448–453, 1245–1269, 1287–1290).

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*Not all of the diversions were in cash. For example, some of the money was used to purchase cars for private use (R. 356–360, 364, 374–377, 387, 394); some was used to pay for landscape gardening at petitioners' homes (R. 331–339); and some was used to buy securities in the names of petitioners' children, who had no knowledge of such purchases (R. 360–362, 365–366, 368–371, 387–424, 456–457, 465–466, 475–479, 619–623, 634–641, 1231–1232).

ARGUMENT

1. There is no merit to the contention (Pet. 12–14) that the trial judge erred in denying the motion to suppress the "black book." The record shows, and the district court properly found, that the "black book" was a corporate record which Max Katz had produced voluntarily and offered to the agent; that, when the agent later told Samuel Katz he would like to see the book and represented that Max had previously offered it to him, he was making a true representation (R. 84–85); that the subsequent production of the book by Max, in response to an administrative summons requiring that specified corporate records (including the "black book") be produced, was an indication that Max and his counsel regarded the document as a corporate record (R. 85); that Samuel Katz, as clerk of the corporation, was authorized to turn the book over to the agent in the first instance; and that there was no infringement of any Fourth or Fifth Amendment rights of the corporation or the petitioners (R. 85–86).[5]

True, the agent testified at the trial that he had wanted the book for two purposes, *viz.*, to check the propriety of the salary increases given certain corporate officers (as he told Max) and to check the accuracy of the reported gross receipts (which he did not tell Max) (R. 319–323). It was for this reason, apparenty, that the book was stricken at the

[5] The "black book" was admitted solely against Max Katz (R. 287), and petitioners' present argument is presumably advanced only as to him.

end of the government's case (R. 864). But if a Treasury agent has a dual purpose in requesting records, it is not incumbent upon him to disclose both purposes to the taxpayer. *United States* v. *Wheeler*, 275 F. 2d 94, 97 (C.A. 3), certiorari denied, 363 U.S. 828. Moreover, as the court of appeals pointed out (Pet. 23), petitioners' argument is both late and specious. It is late because it could have been, but was not, made either at the pre-trial hearing or at the reargument during the trial. It is specious because Max was not, and could not have been, misled by what the agent told him. The cases relied upon by petitioners (Pet. 12–13) turn on their particular facts and have no bearing here, and petitioners cite no authority for their primary argument, *i.e.*, that it was necessary "that there also be evidence that Max was misled" (Pet. 14). If he was not misled, he plainly has no basis for complaint.

2. Equally without merit is the argument (Pet. 14–16) that the trial court erred in denying petitioners' motions to strike the petit jury panel and to dismiss the indictment because the petit and grand jury panels were improperly selected. The contention is that (a) residents living west of Worcester County, and (b) persons not registered to vote, were systematically excluded.

(a) Relying upon *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, in which this Court struck down the practice of excluding from a jury panel all persons who worked for a daily wage, petitioners argue that it was improper for the district court here, when sitting in Boston, not to call jurors from west of

Worcester County. But there is no indication in *Thiel* that this Court was overturning the settled rule (28 U.S.C. 1865(a), Appendix, *infra*) that the decision as to whether panels shall be drawn from the entire district or only from portions thereof is a matter within the sound discretion of the trial court. *Lewis* v. *United States,* 279 U.S. 63, 72; *Ruthenberg* v. *United States,* 245 U.S. 480, 482. This view is fully supported by holdings of the lower federal courts subsequent to the *Thiel* decision. *United States* v. *Gottfried,* 165 F. 2d 360, 363–365 (C.A. 2), certiorari denied, 333 U.S. 860; *United States* v. *Titus,* 210 F. 2d 210, 212–213 (C.A. 2); *United States* v. *Klock,* 210 F. 2d 215, 220 (C.A. 2); *Thiel* v. *Southern Pac. Co.,* 67 F. Supp. 934, 942 (N.D. Cal.), affirmed, 169 F. 2d 30 (C.A. 9), certiorari denied, 335 U.S. 872. The procedure necessitated by a contrary rule would involve burdensome expenditures and cause hardship to jurors required to spend long periods far from their homes. Plainly, Section 1865(a) accords a discretion sufficiently broad to avoid that result.

(b) Nor does it follow that, merely because the jurors were selected exclusively from the list of registered voters, they failed to represent a true "cross-section of the community." That would be true only if those who do not register to vote constitute a legally cognizable "political group" within the community. But such is not the case. "[T]he cross-section of society represented by those registration lists is so extensive as to render frivolous the assertion of systematic exclusion." *United States* v. *Agueci,* 310 F. 2d

817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959. As the First Circuit pointed out in *Gorin* v. *United States*, 313 F. 2d 641, 644:

> For a variety of reasons we reject the argument that eligible persons who do not register to vote constitute a "political" group in the community. In the first place the group does not include only the politically inert. It includes also the politically alert who may perhaps have lived for a year or more in the district but not long enough in their ward to be eligible to register to vote. In the second place, the group has no distinct or definable outlines, for * * * it includes not only the completely apathetic but also those who might register to vote only when interested in a particular election. It includes persons of varying shades of political interest. And in the third place we think the Court in referring to a political group in the *Thiel* case meant the members of some defined political party or group.

3. The contention (Pet. 16–18) that certain corporate records were erroneously admitted against Abraham, Samuel and Harry Katz and that the jury was improperly instructed as to what it must find in order to consider such records is frivolous. The records[6] were admitted solely for the purpose of corroborating the amounts of income reported by petitioners on their tax returns. (R. 862–863, 868, 871–874, 1002, 1089.) It was unnecessary to put the customary stereotyped questions as to whether the records were

[6] The records in question are the pertinent entries in the corporation's cash book and general ledger, and certain canceled checks. (Fn. 3, p. 4, *supra*.)

kept in the usual course of business. Max Katz testified that he personally had made every entry in the books, and it was apparent from his testimony that he did, in fact, keep them in the usual course of the corporation's business; there is no evidence to the contrary. (R. 1137, 1143, 1147, 1160–1161, 1174, 1177–1180, 1202.) Moreover, the four petitioners were the sole stockholders, officers and directors of the corporation (Pet. 4) and had worked together at the plant for twenty years (R. 1172–1174). Thus, the jury was plainly entitled to find, as the court's instructions permitted (R. 1213), that the books were kept in the usual course of business and that petitioners had access to them.[7] There is no requirement that petitioners be shown to have had "knowledge of their content" (Pet. 17). 28 U.S.C. 1732, Appendix, *infra*; *Bodnar* v. *United States*, 248 F. 2d 481, 482 (C.A. 6), cases cited; *Zacher* v. *United States*, 227 F. 2d 219, 227–228 (C.A. 8), certiorari denied, 350 U.S. 993. Indeed, insofar as it required a finding of access, the instruction (R. 1213) was, if anything, more favorable than petitioners merited.

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[7] It appears that at one point the trial judge struck the records as irrelevant and later readmitted them because the defense was attempting to undermine the admissions implicit in the income reported on the tax returns. (R. 870–874.)

[8] The court of appeals, relying on a brief for the government which was "distinguished by its brevity" (Pet. 26, fn. 4), stated that the trial court "admitted the records generally" (Pet. 26), which is not correct (*supra*, p. 9), and held that they were admissible on the theory that Max was acting as the agent of the other three petitioners. The petitioners did not request any instruction on the agency theory.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1963.

APPENDIX

Internal Revenue Code of 1954:

SEC. 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

28 U.S.C.:

SEC. 1732. Record made in regular course of business; photographic copies.

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

* * * * *

SEC. 1865. Apportionment within district; additional jury commissioners.

(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

* * * * *

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